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IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1885.

No. 882.

JOHN H. STEBBINS ET AL., *Appellants*,
vs.
THE TOWN OF ST. ANNE, ET AL., *Appellees*.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

Reply to the Argument of Appellees.

THOMAS S. McCLELLAND,
For Appellants.

ROBERT DOYLE,
Associate Counsel.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
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May it please the Court:

The material issues discussed by appellees in their argument were anticipated in appellant's brief, but we deem it necessary to file this reply, more to clearly bring before the court our position and to show wherein our rights consist, than to discuss the questions of law involved, which, we think, were sufficiently discussed in our former brief.

Either our claims and legal rights have not been made clear, or else the argument of appellees tends to mystify the case.

Relieved of the technical language of pleading, the bill sets up that Jos. E. Young, Wm. D. Judson and Amos Tenney, composing the firm of Jos. E. Young & Co., prior to December 1, 1870, had fully completed their contract for

building the Chicago, Danville & Vincennes Railroad through the town of St. Anne, and thereby, under their contract with the railroad company, became entitled to the possession and ownership of any bonds issued by that town in aid of the construction of the road.

That on June 5, 1869, "under and by virtue of the *laws* of the State of Illinois," as recited in the bonds, the electors of the town of St. Anne voted to donate $30,000 to aid in building the road. That this election was held under the following authority, to wit:

1. The act of March 7, 1867.

2. The act of March 24, 1869.

3. The petition of the supervisor, one justice of the peace, the town clerk and *fifteen* freeholders of the town of St. Anne, filed with the town clerk May 24, 1869, asking that officer to call a special election on June 5, 1869, for the purpose of voting on the question of making this donation; the petition specifying the particular shape the donation should take—that is to say, *in bonds*.

4. The posting of notices on May 25, 1869, by the town clerk, in *five* of the most public places in the town, calling the election for June 5, 1869, specifying the object of the election, the *place* of voting, and designating the character of the debt to be created, to wit: *in bonds*, as asked in the petition.

5. The election actually held on June 5, 1869, in pursuance of the petition and notice, at which the people voted aid, which was to be in bonds.

That on December 19, 1870 (the printed record erroneously says 1869), the town authorities audited the sum voted, and directed the supervisor to execute the bonds, in pursuance of the vote of June 5, 1869.

That on December 24, 1870, the supervisor did execute the bonds, and on December 27, 1870, delivered them to Jos. E. Young & Co., who were entitled to them,

and who thereby became the legal and equitable owners of the same.

That Young & Co. re-delivered the bonds to the supervisor, who was the only person qualified under the registration act of April 16, 1869, to make the certificate and affidavit entitling the bonds to be registered, for the purpose of having that person register the bonds with the State auditor.

That the supervisor, instead of fulfilling his trusts in that regard, carried the bonds back to St. Anne, and on January 5, 1871, had served upon him an injunction issued out of the Circuit Court of Kankakee County, at the suit of Coyer and others, tax-payers, against the supervisor and other town officers, restraining them from re-delivering the bonds, and seeking to have the same cancelled.

The legality of the bonds being in dispute in that suit, and the railroad company being a party thereto, Young & Co. seem to have taken no steps to recover the bonds, and in 1876 the case was finally decided by the Illinois Supreme Court holding that the bonds should be delivered.

Coyer et al. v. Chicago, Danville & Vincennes R. R. Co., 79 Ill. 373.

Pending this litigation, the bonds were deposited with the clerk of the Kankakee County Circuit Court for safe keeping.

On April 4, 1876, the injunction was dissolved and the bill dismissed in the Kankakee County Circuit Court, in pursuance of the mandate from the Supreme Court.

On *April 7, 1876*, the then supervisor of St. Anne sued out a writ of replevin before a justice of the peace, took the bonds from the possession of the circuit clerk, and on *April 8, 1876*, the town officers destroyed the bonds. The replevin writ was not returnable until *April 15, 1876*.

On May 20, 1875, the C., D. & V. R. R Co. became insolvent, and has ever since been in the hands of a receiver. That at that time it owed Young & Co. $588,556.10 on account of constructing the road. This claim was merged into a judgment on November 30, 1879, in the Iroquois County, Illinois, Circuit Court.

In 1875 Mr. Young became embarrassed by reason of the failure of the railroad company, and his estate was placed in the hands of a receiver, who sold his one-third interest in the assets of J. E. Young & Co. to the complainant, Stebbins, which, by operation of law, carried with it all collaterals which J. E. Young would have been entitled to, including the St. Anne bonds.

On February 8, 1876, Wm. D. Judson assigned his interest in the bonds to Edward G. Judson.

On March 9, 1876, Amos Tenney assigned his interest to Willie Amos and Sutherland Tenney.

These two assignments, it will be observed, were made to secure debts owing by the assignors. By operation of law any overplus, after satisfying the debts, would revert to the assignors, and therefore they became necessary parties to this suit.

On September 7, 1877, the C., D. & V. R. R. Co., for whose benefit the aid was voted, and J. E. Young & Co., who had the legal interest in the bonds which had been issued, and who alone could institute any *legal* proceedings to enforce a re-issue of the bonds, or the execution of new bonds to take the place of those burned, filed a petition, in the Circuit Court of Kankakee County against the town of St. Anne and its officers, for the purpose of procuring such new bonds. Although Stebbins, Edward G. Judson and Willie Amos and Sutherland Tenney were equitably interested in the bonds, they would have had no standing in a suit brought to compel a reissue. The persons *legally* entitled to the possession of the bonds alone could institute such suit, and Jos. E.

Young & Co. were those persons. The action seems to have been a petition in chancery, however, instead of a petition for mandamus, and consequently the suit failed, and for no other reason whatever.

That case, which was reported in 1882, in 101 Ill. 151, can have no other force or effect than to decide that the parties complainant mistook their cause of action, which should have been at law and not in chancery. That was the sole question before the court.

In 1883, Jos. E. Young & Co. filed their bill in chancery in the Circuit Court of the United States for the Northern District of Illinois, for the purpose of reaching the value of their bonds; but it appearing that Young's interest had wholly passed from him, and the respective interests of Wm. D. Judson, and Amos Tenney also, to the extent of their debts to their assignees, the bill was dismissed without prejudice, and the present proceedings instituted for the purpose simply of recovering the present worth of the bonds, had they not been destroyed, and at the suit of the *real* persons in interest.

Thus the whole history of the case is given to the court, and we submit whether or not the most continuous and persistent effort has not been made to recover these bonds or their value.

A very large part of appellees' argument is devoted to showing that the appellants could not recover on the bonds, were they in existence and held by them, on the ground that the election under which the bonds were voted and executed was illegal, and argue therefrom that complainants cannot maintain this suit, as they stand in no better position than they would if they held the bonds. This is all we claim. We invoke the same law in this suit on destroyed instruments, that we would invoke if suing on the instruments themselves, so far as their legality is concerned.

Touching the legality of the bonds which were issued December 24, 1870, we saw fit in our former brief to rely on *C., D. & V. R. R. Co.* v. *Coyer*, 79 Ill. 373, as conclusive on that question.

We still think that that question ought to be treated as *res adjudicata*. But if the court should think otherwise, is the point well taken?

The first error alleged is that the act of March 24, 1869, provides that towns might issue bonds on a vote of a majority of the *legal voters* voting at any election, etc.; that the certificate of the election, as engrossed in the town record book by the clerk, sets forth that at such election 112 *persons* voted for the proposition contained in the petition and notice calling the election, and 75 *persons*, voted against it, which was not a compliance with the words of the statute. Can this conclude us? We aver in our bill that the persons voting at the election were *legal voters*, and that averment can only be met by proofs which must be brought before the court upon the hearing of the case on its merits. Further, all presumptions are in favor of men acting in accordance with law. No persons except legal voters had any lawful right to participate in the election, and every presumption would be that none but *legal* voters did participate in this election.

The notice of this election ran to the "*legal voters of the town of St. Anne.*" This subject was under discussion in *Walnut* v. *Wade*, 103 U. S. 693, and that case is applicable to the case at bar, so far as the issues presented in this case are concerned. If an answer had been filed denying the averment in the bill that the 112 *persons* were *legal voters*, then it would become a matter of proof, but on demurrer this allegation must be taken as true.

The bill does not pretend to give the details as to the manner in which the election was conducted, nor can that question be raised on the demurrer. The bill sets forth

that an election was in fact held, giving the result of the same, and showing the authority therefor, which was all that was required. If the election was really conducted in so informal a manner as to vitiate the bonds, that would arise in the defense on the trial of the case, upon the bill, answer, replication and proofs. The question we have to meet here is, "*Is the bill sufficient on its face?*"

Comparing the notice of this election with the requirements of the law, it seems that every point is covered. We are unable to discover a single omission. Notices were posted in *five* of the most public places in the town. Counsel says the law only required *four*. Counsel says: "This law of 1869 provides that the "notice shall state *the place*, and the notice says the elec-"tion shall be held at the Institute room." What could be more plain or specific? In a village like the appellee, an "institute room" would presumably be the hall for all public assemblies. Whether so or not, "the Institute room" mentioned in the notice was a *place* fixed for the election and fulfilled the condition of the law.

Counsel says complainants claim that the bonds were issued under the laws of 1867 and 1869, but the bonds show on their face that they were issued under the law of 1867 solely. Is this correct? The bonds recite on their face that they were "issued under and by virtue of the "*laws* of the State of Illinois, made to authorize cities, "towns or townships lying within certain limits to appro-"priate moneys and levy a tax to aid the construction of "the Chicago, Danville and Vincennes Railroad." No act is mentioned. At the time the petition was filed, notice posted, election held and bonds issued, there were two acts in full force, to wit:

"An act to authorize cities, towns or townships lying "within certain limits to appropriate moneys and levy a "tax to aid the construction of the Chicago, Danville and "Vincennes Railroad," approved March 7, 1867; and

"An act to enable towns, townships, cities or coun-
"ties along the line of the Chicago, Danville and Vincen-
"nes Railroad to contribute toward the construction of
"said railroad," approved March 24, 1869.

Who shall say these bonds acquired no vitality from this latter act, or that the bonds were issued under the former act alone? We may invoke any law in existence at the time the vote was taken, which would authorize the people of this town to grant this aid, and no such limitations can be imposed upon us as claimed by counsel in his argument.

Counsel argues that it was necessary to publish a notice in some newspaper published in the town. The acts of 1867 and 1869 fixed the character of the notice and the manner in which it should be made public. No newspaper publication was required. The requirements of the act of March 24, 1869, were literally complied with, by posting *five* notices, or one more than the act required. By the act of 1869 towns were granted the alternative of publishing a notice in a newspaper OR by posting. In this case the method of giving notice by posting was adopted. The publication was, therefore, not necessary.

Counsel claims that the petition, notice and record of the clerk showing the result of the election are ambiguous. He does not understand what was intended. He thinks the proceedings contemplated a subscription to the capital stock of the road; that the amount voted was for a right of way through the town; that the vote was for a tax, and that the people had no power to vote bonds; that a donation was not contemplated; that if the town had to pay for a right of way besides donating the $30,000, the action of the town was in violation of section 3 of the act of 1869, and therefore the whole proceedings were void; that the petition, notice and record show that three distinct propositions were submitted to the electors, and there is no evidence as to how they voted on each; that if the

vote was to raise the money by a tax on the town, then it could not be that the donation was to be paid in bonds; that the electors had no power to vote bonds; that they were limited to voting an appropriation or donation, and then the "proper authorities" should determine whether this appropriation or donation should be paid by an immediate levy of a tax, or issue bonds and sell the same to pay the donation; that the fourth section of the act of 1869 authorizes towns to borrow money *and* issue bonds, etc., but that the bill quotes the act as authorizing towns to borrow money *or* issue bonds; and then counsel gives an interpretation to the substitution of the word "*or*" in the bill for "*and*" in the act. The act itself is printed in full in our former brief, and its careful inspection solicited. The word "*or*" in the bill is palpably a clerical error—only the word "and" in the context would make the section intelligible. As to the meaning of the petition, notice and recorded result of the election, taken in connection with the acts of 1867 and 1869, and the subsequent course of the officers of the town in issuing the bonds and delivering the same, there can be no doubt or confusion.

We only desire that this petition, notice and record of the result of the election be read in connection with the acts of the Legislature, and are satisfied that but one interpretation can be given them, to wit: that the people voted a donation of $30,000 to aid in constructing this railroad through their town; and that, upon completion of the road, the donation should be paid by bonds of the town; and its officers acted upon that understanding by issuing the bonds and delivering them when the condition precedent was complied with on the part of the railroad company. The language of the petition and notice cannot be tortured into meaning that the vote was to be for a subscription to the capital stock in the road; nor can any or either of the other unnatural constructions be given

to the language of the document as claimed by counsel for appellee.

Counsel argues that because the contract between the railroad company and Young & Co. was entered into February 2, 1869, before the passage of the act of March 24, 1869, therefore the appellants must rely on the act of March 7, 1867, as the only authority for issuing the bonds; and as that act does not provide for issuing bonds at all, the proceedings of the town, and the bonds executed December 24, 1870, were void. We clearly allege that the bonds depended on the act of 1869 for their vitality, and it is immaterial when Young & Co. entered into their contract with the railroad company. The essence of the contract was, that they were to receive all aids to be donated by the towns on the line of the road and apply the same on their contract for construction.

It is urged that the bonds, being signed only by the supervisor, were illegal. The obligation or debt having been created by the vote of the people—the only contract-making power in a town—it was not material who should execute the evidence of such indebtedness. In the cases of *Windsor* v. *Hallett*, *Wade* v. *Walnut*, and other cases cited in our brief, and noticed by appellee, the supervisor and town clerk were held to be proper persons. In the case at bar, the town authorities directed the supervisor alone to execute the bonds. (*Record, page 13.*) They could as well have directed any other officer to perform the act, or even a stranger. Under our statute, the supervisor is made the executive officer of the town, and charged with all executive business of the town. The clerk is merely the record keeper, and in every instance of executing municipal bonds which has come under our notice the clerk has only countersigned the bonds, the execution having been done by the supervisor. In this case there was no attempt on the part of the supervisor to bind the

town by any act of his own. He merely carried out the directions of the town.

The Illinois Supreme Court in *C., D. & V. R. R. Co.* v. *Town of St. Anne*, 101 Ill. 153, says the bonds "were signed by the proper authorities."

The case of *C., D. & V. R. R. Co. et al.* v. *The Town of St. Anne et al.*, reported in 101 Ill. 151, cannot operate as an estoppel in this case. We must rely on the character and purport of the suit as reported, and must treat it in connection with the case of *C., D. & V. R. R. Co.* v. *Coyer et al.* It seems clear that the sole question determined by the court was that a suit in chancery would not lie against a public officer to compel him to perform his official duty, but that the action must be at law by mandamus; or if the suit was to be treated as a creditor's bill, it must show a judgment at law and an execution returned *nulla bona*. Certainly that record presented a different case from the record in this suit, and this court is left free to pass independently upon the issues as presented by the demurrer filed to the bill in this case.

In this case of *C., D. & V. R. R. Co.* v. *St. Anne*, on page 154, the court intimates that under the law it was discretionary in the town to vote an immediate tax and pay the donation, *or* borrow money and issue bonds. This being so, and the town having exercised its discretion by issuing the bonds and delivering, cannot change its attitude by surreptitiously getting possession of the bonds, destroying them, and then require the railroad company to collect the donation through taxation. The mere fact that the bonds were delivered to Young & Co., who were entitled to the donation, instead of being turned over to some one from whom the town might have borrowed money to pay the donation, cannot certainly be a controverted question, or operate to vitiate the bonds. As between the town and the railroad company, a delivery of the bonds in payment of the donation cancelled the

town's obligation precisely as if it had borrowed the money on its bonds and paid over the money to Young & Co.; and if the bonds were not then marketable, it was the easiest and most feasible way to meet its obligation.

The opinion in this case says, on page 153, *R. R. Co.* v. *St. Anne*, 101 Ill.: "A citizen of the town filed a "bill to enjoin it from issuing the bonds, and pending the "suit the town filled up the bonds for the amount, and "they were signed by the proper authorities and placed "in the hands of the circuit clerk, to hold until that suit "should be terminated. The town afterwards destroyed "these bonds and refused to issue other bonds and deliver "them to the company."

The suit referred to must be the Coyer suit, in the 79 Ill. 374. If so, the court must have had a false record before it, or else the bill in the case at bar must be untrue in its averments.

The bill filed in this case avers that the Coyer suit was begun January 5, 1871; that the injunction was served on that day. It further avers, that prior thereto, on December 24, 1870, the bonds were executed, and on December 27, 1870, delivered to Young & Co. A copy of one of the bonds is incorporated in the bill. It is clear, that in neither of the cases reported in the 79 and 101 Ill., did it appear to the Illinois Supreme Court that the bonds had been in fact delivered to the railroad company or to Young & Co., and its option in the premises exercised, or that Young & Co. or the railroad had acquired any legal rights thereby.

Both of these cases, so far as they go, recognize the validity of the bonds in controversy. In the Coyer suit the election was held regular, and in the latter suit the town's discretion to issue bonds under the act of 1869 was recognized. The bill avering that that discretion was exercised by the town, it is estopped from denying its

liability, notwithstanding its fraudulant acts in destroying the bonds.

On the first two pages of our former brief we stated what was claimed by the complainants. That Stebbins claimed one-third, or J. E. Young's interest in the bonds. That Edward G. Judson sought to enforce a trust and recover William D. Judson's one-third interest to the extent of his debt. That Willie Amos and Sutherland Tenney sought to enforce a trust and recover Amos Tenney's one-third interest in the bonds. That William D. Judson and Amos Tenney claimed any residue after paying their respective debts. Counsel seems to regard these claims as not warranted by the allegations of the bill.

By reading the respective assignments made by Wm. D. Judson and Amos Tenney it will be seen that they sold and assigned their claims to their respective assignees, but that the assignments were made as collateral securities to specified debts. By operation of law William D. Judson would be entitled to any surplus of his one-third which might remain over and above canceling his debt. So in the case of the Tenneys. Suppose it should subsequently appear that William D. Judson and Amos Tenney had paid their respective obligations, would it be questioned for a moment that they were entitled to their securities, their collaterals, their interest in these bonds? Counsel mistook an assignment of a collateral as security for a debt, to be returned on payment of the debt or the overplus paid to the assignors, for an absolute ownership by purchase. A computation of the amount of the debts owing by William D. Judson and Amos Tenney to their respective assignees will show that their respective interests in the bonds will be swallowed up should collection be made, and that fact warrants the allegation in the bill that Edward G. Judson is the legal and equitable owner of William D. Judson's one-third interest, and that Willie Amos and Sutherland Tenney are the legal and equitable owners of Amos Tenney's one-third interest; but we are not relieved from making William D. Judson and

Amos Tenney parties to this bill, because it shows on its face that the assignments are in the nature of a trust fund, subject to reversion to the original owners on payment of their debts.

As to Stebbins owning J. E. Young's interest in the bonds, the bill is intelligible. Young owned one-third of a judgment against the railroad company amounting to $588,556.10, being a balance due for constructing this road. To apply on this judgment were certain aids voted by towns on the line of the road, and not yet realized, among which were the bonds of St. Anne. Young's interest in the judgment was bought by Stebbins, who, at the same time, became the equitable owner of one-third, or Young's interest in all of these uncollected aids, including one-third interest in the St. Anne bonds, if ever collected.

On page 22 of his brief, counsel for appellees says: "The statement, frequently made, that the case of Joseph "E. Young & Co. and the C. D. & V. Railroad Co.-"pany, 101 Ill. Rep., page 158, 'was dismissed without "prejudice,' is another of those misrepresentations, or "only half-truths — or suppression of the real truth — in "order to mislead the court," and counsel proceeds to give what he believes was the order of the Circuit Court of Kankakee County, to wit: that the proceedings should be dismissed without prejudice to any proceedings at law. Inasmuch as that case was dismissed because the proper action, under the relief prayed, was mandamus and not in chancery, the order, as given by counsel in his brief, was pre-eminently the proper one; but the terms of the order are immaterial here, and, as they do not appear in the record, are hardly a subject for discussion. The bill gives the nature and purpose of those two suits. Now, in this argument, we have nothing to guide us but the bill itself, and two cases as reported and referred to in the bill. Should the bill ever be answered, and proofs taken in the case, the facts averred will appear more in detail.

Counsel for appellees frequently refer to matters not in

the record. On pages 23 to 26 he undertakes to show how the C., D. & V. R. R. Company became a party to the Coyer suit. We can neither affirm or deny what he says, for the reason that all we know about it is what the 79 Illinois declares, and that alone is before this court. There is so much extrinsic matter in the brief, that each part of it ought to be compared with the record to see that there is no deviation therefrom.

Counsel pretends to quote what the court below said when deciding the demurrer in this case. The court's opinion, if any was given, was not incorporated in the record, and to make alleged quotations from any such supposed opinion in brief of counsel is not right.

On the question of the statute of limitations being a bar to this suit, we can only repeat that the action is based on the bonds themselves, executed and delivered in December, 1870. If appellants have any claim at all, it is upon those bonds, against which the statute of limitations would only commence to run after the lapse of sixteen years from the date of their maturity. Nor can laches be imputed to a claim, to recover which persistent effort has been made, as in this case.

The loss or destruction of the bonds in controversy does not alter the case. By fraudulently—so claimed—getting possession of the bonds and destroying them in 1876, by the town or its officers, it did not throw upon the railroad company, or Joseph E. Young & Co., or their assigns, the responsibility of suing upon the original contract, or the vote of the people. By the execution and delivery of the bonds all subsisting rights were merged in the written instruments, and every action should be based on those instruments.

In my former brief I cited various authorities to show that equity is the proper remedy under the allegations of this bill. Counsel makes no strenuous effort to dispute this. He thinks the remedy applies to lost rather than to destroyed bonds, but as will be seen by the authorities,

that distinction has not been made by the courts. In cases of bonds actually destroyed—or lost after maturity—the necessity of giving an indemnifying bond has been waived by the courts. This is the only distinction drawn. But this is not the only ground for the exercise of chancery powers in this case. There are trusts to be enforced and rights to be adjudicated not within the jurisdiction of the law courts.

The Illinois authorities cited in my brief show a parallel case:

Morgan Co. v. *Thomas*, 76 Ill. 139.
Thomas v. *Morgan Co.*, 59 Ill. 479.
Thomas v. *Morgan Co.*, 39 Ill. 496.

Counsel makes some points scarcely warranted by the record, among which is the argument of hardship, if the people of the appellee town should be compelled to pay this debt, which has more than doubled in amount. This argument would have more force if this result had been brought about by appellants or the persons from whom they derived title to the bonds.

The long and vexatious delay in payment having been brought about by the wrongful course of this town, it ought not to complain if it ultimately has to pay what it agreed to pay, with interest for the delay. This would be only doing equity.

"The town obtained all it expected to obtain, and ought to pay what it agreed to pay."

The People, ex rel. v. *Holden et al.*, 82 Ill. 103.

"Common honesty demands that a debt thus incurred should be paid."

Commissioners v. *Bolles*, 94 U. S. 110.

THOMAS S. McCLELLAND,
For Appellants.

ROBERT DOYLE,
Associate Counsel.

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ARGUMENT AND BRIEF FOR APPELLEES.

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BRIEF OF ARGUMENT OF APPELLEE.

I.

The appellants in the complaint charge that the town of St. Anne voted aid to the amount of $30,000 to the Chicago, Danville & Vincennes railroad company, and as evidence to support this charge, embody in the bill of complaint certain documentary evidence which they claim shows that under legislative power a lawful town meeting was called and held which voted this aid. We insist that the documentary evidence does not sustain these charges in the bill. Chapter 103, article 5, of Gross Statutes of Illinois, page 747, contains the directions how such meetings shall be organized, conducted,

and a record made and kept of their proceedings, and what shall be the evidence of the same.

§ 1. The electors present at any time between the hours of 9 and 10 o'clock in the forenoon of the day on which there is an annual or special town meeting, shall be called to order by the town clerk, if there be one. In case there be none, or he is not present, then the voters may elect by acclamation one of their number chairman. They shall then proceed to choose one of their number to preside as *moderator* of such town meeting.

§ 2. Before the moderator or presiding officer of any town meeting shall enter upon the duties of his office, he shall take an oath faithfully to discharge the duties of such office.

§ 3. The town clerk, last before elected or appointed, shall be *clerk of the town meeting*, and shall keep faithful minutes of its proceedings, which he shall enter at length, every order or direction, and all rules and regulations made by such meeting.

§ 14. The minutes of the proceedings of every town meeting *subscribed* by the *clerk* of said meeting and by the *presiding officer*, shall be *filed* in the office of the town clerk within two days after such town meeting.

§ 22. The canvass being completed, a statement of the result shall be entered at length by the clerk of the meeting in the minutes of its proceedings, to be kept by him as before required, which shall be publicly read by him to the meeting.

Sec. 2, art. 9, under the head of the "Town Clerk and his Duties," reads: § 2. "He shall transcribe in the book of record of his town the minutes of the proceedings of every town meeting held therein."

Art. 4, sec. 9, Gross Statutes, page 746, provides, * * * * "The place of holding special town meetings shall be at the place where the last annual election was held."

The certificate in the bill purporting to contain the minutes and result of the town meeting was not signed by the clerk and moderator of the town meeting as provided for in said section 14. It does not appear that the minutes were filed in the office of the town clerk as required by said section.

II.

The proceedings of the town meeting were illegal and void, because

1. The certificate does not show that the town meeting was held at "the place required by law," namely, at the place where the "last town meeting was held."

2. It was not properly called. Four notices instead of five notices being posted. Notice of this meeting was not published in a newspaper in the town, as required by section 9, of article 4, of Gross Statutes, page 756.

3. The certificate of the proceedings of this meeting does not show that the votes cast for the appropriation were legal voters as required by section 5, of article 5, of chapter 103. The certificate says that 112 "persons" voted for the tax, but does not say they were legal voters.

4. The word "persons" includes males and females, aliens and children, and this certificate should show that the persons who voted were such as were qualified.

5. There is no evidence that there was "*a presiding officer*" at said meeting.

6. There is no evidence that there was any clerk of that meeting.

7. The proceedings of the meeting were not signed by the clerk of the meeting or by the presiding officer, according to section 14.

8. There is no evidence that any minutes of a special town meeting were kept and returned to the office of the town clerk according to said section.

9. If any election was held and the proceedings were attested by "the clerk of the meeting and the presiding officer," still they do not show any "appropriation or donation" by the *legal voters* of the town of St. Anne.

III.

The petition, notices and certificates of the election are ambiguous, uncertain and contrary, and fail to show "authority," either to subscribe for stock or to make a donation.

IV.

If the action of the special town meeting had been regular and in conformity to law it would not have created an "indebtedness" against the town; it would have only been "authority" to the town authorities.

Town of Concord vs Portsmouth Savings Bank, 2 Otto, 626.

Aspinwall vs Board of Supervisors, 22 Howard, 364.

V.

The bill of complainant shows that the matters in controversy have been litigated in a case in the state court wherein the Chicago, Danville & Vincennes railroad company, and Joseph E. Young & Co. were complainants, and the town of St. Anne were defendants, and dismissed upon a demurrer to the bill. That the case was appealed to the appellate court and thence to the supreme court, and the decree of the circuit

court dismissing the bill was affirmed. That while it is true that the bill charges that the bill was dismissed without prejudice, yet at the same time the appellant calls the attention of the court to the report of the proceedings and opinion of the supreme court in that case where it appears that the case was dismissed with prejudice to any other proceedings in equity, but not to any proccedings at law.

Chicago, Danville & Vincinnes Raiload Company and Joseph E. Young & Co. vs Town of St. Anne, 101 Ill., page 151.

Hughes vs U. S., 4 Wall, 23.

Walden vs Bodly, 14 Pet., 156.

The dismissal of a bill upon a demurrer for want of equity is a bar to another suit.

Hughes vs Blake, 1 Mason, 515; 2 Story, Eq. Jur, sec. 1623.

Foote vs Gibbs, 1 Gray, 412.

VI.

The appellants claim that the bill of complaint differs from the bill in the former suit of Young & Co. and the C. D. & V. R. R. Co. vs Town of St. Anne, in the state court, in this respect. That in this bill the allegation is made that the bonds were actually delivered by the supervisor of the town to Joseph E. Young, which fact did not appear in the former bill. If so, the appellants are not relieved from the bar of the decree of dismissal of the bill in the case in the state court on that ground. All matters entering into the controversy necessary to be presented to obtain relief in equity, must be brought forward, as equity will not hear a controversy by piecemeal, and the principle of *res adjudicata* covers such matters, as the parties have neglected to bring forward as well as the matter presented.

Stockton vs Ford, 18 Howard, 418.

Same case, 1st Black, page 360.

Rogers vs Higgins, 57 Ill., 247.

Danohar vs Prentiss, 22 Ill., 311.

VII.

The appellants claim that Edward G. Judson, Willie A. Tenny, Sutherland Tenny and Stebbins are not barred or excluded by the decree of the state court dismissing the bill brought by Young & Co. and the C. D. & V. R. R. Co., because they were not parties to the suit. It appears by the averments of the bill that the interests they claim to have in the suit were acquired by them previous to the commencement of the suit in the state court, and that if they did not prosecute the suit in the name of Young & Co. et al, they stood by and acquiesced in such prosecution and are now stopped from claiming any relief.

Pomroy, Eq. Jur., vol. 2, sec. 818.

Equity requires a diligent activity in prosecuting the interest and claims of these appellants, and by their standing by and allowing other parties to prosecute such claims, and demanding the relief they now seek, they were guilty of laches.

VIII.

The appellants have been guilty of laches and have slept on their rights.

Sullivan vs R. R. Co., 99 U. S, 811.
Brown vs Company of Buena Vista, 95 U. S., 160.
Golden vs Kimmel, 99, U. S., 201.
Carliser vs Walrod, 83 Ill., 171.
Sloan vs Graham, 85 Ill., 26.

IX.

If the vote of St. Anne should be considered a contract and indebtedness instead of an authority to make an uncompleted gift, it would be barred by the Statutes of Limitations in Illinois.

Gross' Statutes, chapter 66, page 430, section 18, being

the Limitation Laws in force in 1869, provides "all actions founded upon account, bills of exchange, orders, upon promise not in writing, express or implied, made after the passage of this act, shall be commenced in five years next after the cause of action accrued.

Section 15, of chapter 83, of the Revised Statutes of Illinois, edition of 1874, approved Ayril 4, 1872, provides— "Actions on unwritten contracts express or implied, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

The bar by lapse of time is not relieved by any pretended allegations of fraud, where the facts were fully known and relief was not promptly asked for. ~~Parson~~'s Eq. Jur., vol. 2, section 917. Pomroy's

X.

Suits at law may be brought under the laws of Illinois on lost bonds, and the payor protected thereby, by the courts.

Section 14, of chapter 98, of Revised Statutes of Illinois, page 720, provides that "In any action founded upon any lost note, bond, bill or other instrument in writing, or in which the same, if produced, might be allowed as a set off in defence, if it shall appear that such instrument is lost while belonging to the party claiming the amount due thereon, to entitle him to recover upon or set off the same, he may in the discretion of the court be required to execute a bond to the adverse party, in at least double the amount of such bond, bill or instrument in writing, with sufficient security to be approved by the court in which the action is pending, conditioned to indemnify the adverse party, his heirs or assigns," etc.

XII.

The English courts have drawn a distinction between lost bonds and destroyed bonds. "Equity never entertained jurisdiction over destroyed bonds, because the remedy was always adequate at law. Pomroy Eq. Jur. vol 2, p 2; Wright vs Lord Maitland, 1 K and I, 701, 708, per page Wood N. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1885.

JOHN H. STEBBINS ET AL., *Appellants,*
vs.
TOWN OF ST. ANNE ET AL., *Appellees.*

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF AND ARGUMENT FOR TOWN OF ST. ANNE.

There is a clerical error in the transcript of the record of this case in setting out the demurrer to the bill, which error is carried into the printed record at page eighteen.

By a stipulation filed in this case for the purpose of correcting that error, it is agreed wherever, in that demurrer, the names "Joseph E. Young," Joseph E. Tenny & Company," Joseph E. Tenny & Co.," J. E. Tenny," and "Tenny," occur "*Young*" should be substituted for "*Tenny*." In referring to the bill in this case we refer to the printed record.

I.

In presenting the demurrer in this case, we will call the attention of the court in the first place to matters which are

fatal to the right by *any party under any form of action* to recover from the defendant, St. Anne, bonds in controversy, or the amount of a donation as claimed in this bill.

It is over fifteen years prior to the commencement of this suit the alleged vote was taken, under which it is claimed the town of St. Anne became liable to pay the Chicago, Danville & Vincennes Railroad Company $30,000. There is no question of bona fide holders of bonds, or the right of third parties in any way involved, for it will be conceded, we apprehend, that if the railroad company could not recover the complainants cannot.

We then look into the election as set forth in the bill. The petition, the notice and alleged *certificate* of election are copied in full in the bill as a part of it (printed record, p 3, 4, 5).

One of the laws under which the alleged vote was taken (March 24, 1869,) set out in complainants' argument, page 17, provides that the *legal voters* of any town, township or city along the line of said railroad * * may by a majority of the *legal voters* voting at any election held for the purpose make appropriations, donations.

We read that certificate of the town clerk and we find that "one hundred and twelve *persons* voted for said tax * * and seventy five against it." The law required an election and majority of "legal voters" and the bill sets up an election and a majority of "*persons*." Whether these persons were male or female, minors or aliens, we are not informed. Certainly that certificate does not show those persons to have been legal voters as the law required.

In the argument of complainants at the circuit court, to meet the above point, the complainants urged that they have averred in the bill those persons were legal voters, "but had not this been the case" (meaning had there been no such averment) "the law will presume the judges did their duty and those voting were legal voters." That it to say, that courts

by authority of law will presume the official minutes of the town clerk are in part not correct; that the clerk used in his official minutes the term "persons" otherwise than in its popular sense. In support of that proposition they cited the Town of Walnut vs. Wade, 103 U. S., 693. We presume complainants in reply will make the same point again.

We do not see anything in that case sustaining the view of complainants. It is true in that case the court construed the words "inhabitants of the town" and "people of the town" to mean legal voters; but it did not presume such to be the case without data. The court so construed those words, gave them that construction, on a consideration of the whole statute of its different phraseology. The action in that case was based on coupons to railroad aid bonds issued in payment of subscription to the capital stock. The statute required the approval of "inhabitants of the town" before subscriptions could be made and bonds issued. The bonds followed the statute except used the words "people of the town" instead of its equivalent inhabitants of the town. It was insisted by defendant in that case that the bonds on their face showed they were not made by authority of the legal voters of the town; that the term people includes all sexes and ages. The court, by taking the whole statute together, came to the conclusion that the legislature used the words "inhabitants of the town" in the sense of "legal voters of the town," and as the same words are used in the bonds, or rather the equivalent, of that used in the statute the recitals in the bonds followed the statue, holding also that bona fide holders of such bonds need not look beyond the recitals in the bonds and the statute under which they were issued. The term "persons," or its equivalent, inhabitants, is not found in either of the acts of 1867 or 1869, but "voters" and "legal voters" are, so it cannot be said that the certificate made a part of the bill follows the statute, or anything in the statutes, by which the court can construe "persons" to mean legal voters.

The complainants have made that certificate a part of their

bill—declare it to be the record evidence of a special election on which they set up a claim of right. They say (page 5 of record) "the result of said election and the terms and conditions of said vote being more fully set forth in the certificate of the town clerk of the town of St. Anne and spread upon the records of said town; which certificate is in the words and and figures as follows." Here follows a copy of the alleged certificate.

In presenting that certificate as a part of their bill the complainants did that which works on pleading both at law and in equity advise; that is so to present a case as to raise questions of law to be passed upon by the court at the earliest opportun ty.

A record of the result of a town meeting in regard to town railroad aid is a necessary link in a claim of right to such aid, and the complainants set up that certificate *as the record*, and if such certificate is not sufficient they must fail by reason of it. That certificate is not what the statutes of Illinois require as evidence of the result of town meetings; the town clerk had no authority to make such a certificate; the clerk had no authority to spread such a document upon the records of the town of St. Anne; it is a nulity.

Both the acts cited by the complainants (1867 and 1869) provide for the calling of special town meeting to vote, which would have to be conducted as required under the general statutes of the State. The statute in relation to holding town meetings (Pub. Law of Ill., 1861, page 223) article 5, section 1, requires the voters to elect one of their number to preside as moderator at the meeting. Section 2 requires the presiding officer, the moderator, to take an oath to faithfully discharge his duties. Section 3 requires the town clerk to keep faithful minutes of the proceedings of the town meeting. Section 22 requires that after the canvass is completed a statement shall be by the clerk entered at length in said minutes. Section 14 requires those minutes to be *signed by the*

moderator, the presiding officer, also by the town clerk, and thus subscribed filed in the office of the town clerk within two days after the town meeting. Section 2, article 9, page 231, of the law, requires the town clerk to transcribe into the book of the record of the town those minutes. Section 6 of the latter article makes copies of those minutes certified to by the town clerk evidence in courts.

That certificate, so called, set out in the bill of complaint, is in no sense a compliance with the statutes. It does not proport to be minutes of a special or other town meeting. It is not signed by the moderator. All that can be claimed for it is that it is the opinion of a person calling himself clerk of the result of what he calls a special town meeting, an opinion which he had no authority to spread upon the records of the town. The statute imposed great duty upon that moderator, more so than upon the town clerk. He is required to take an oath to faithfully discharge his duty and is to see that *faithful minutes* are kept and to attest their truth by his signature,

The legislature must have had an object in requiring the electors on the day of a town meeting, especially a special town meeting, to chose one of their number a presiding officer, instead of imposing that duty upon the supervisor or some other officer then holding office. We can conceive an object. We know by observation that at times towns are greatly stirred on questions of town policy to come before the legal voters at their town meetings in regard to which policy the then officers of the town might be strongly partisan. The electors would desire and it would be desirable to have some one to preside at such meetings in whom the legal voters would have confidence to preside and see to it the true result of the meeting is preserved, verified by him, and thus become a part of the records of the town.

The so-called record of the town, the "certificate," weighed by the statute is found wanting in all those safeguards deemed necessary by the legislature to protect the people of a town,

to establish the verity of the records of its meetings.

Again, the certificate shows that this election was a special election, and the law (1869, sec. 3,) provides that "the special town meeting may be called as now provided by law for such meetings." "That four notices shall be posted of the *time, place* and *object* of said election" The law under which the vote was taken must, we apprehend, be complied with strictly in regard to the holding of the election. The law of March 7. 1867, says "at the usual place of election," and the general law provides that special town meetings shall be held "at the place of holding the last annual election." Pub. Law 1861, page 222, section 8). But this law of 1869 provides that the notice shall state *the place*, and the notice says the election shall be held at "the institute room." The certificate of the town clerk does not show where this electon was held.

The complainants claim in their bill (record, page 5,) that an election by force of both the acts of 1867 and 1869, but they show by an alleged bond set out in the bill (page 7, printed record,) that the election was held by virtue of the act of 1867. The bond recites, "This bond is issued under and by virtue of the laws of the State of Illinois, made to authorize cities, towns and townships lying within certain limits to appropriate money and *levy a tax* to aid the construction of the Chicago, Danville & Vincennes Railroad Company.' The foregoing quotation from the bond is the caption of the act of 1867 (complainants' argument, 16). This caption is different from that act 1869 (page 17 of the argument).

The bill shows (p. 4, rec) the alleged election was not called as required by statute; that is to say, notice was not given as required by statute in relation to special town meetings. It is alleged that the special election or town meeting was held at the village of St. Anne; that notice of a special meeting was called by posting five notices. The act of 1867 required five notices, while the act of 1869 only four. The public law then in force in relation to special town meetings (Pub. Law

1861, page 222, section 8,) required five notices of special election to be posted, also that the notice be published in a newspaper, if there be one in the town. The bill does not aver or show the publication of notice in a newspaper in the village of St. Anne, or town of St. Anne. The statute requires both posting and publishing. It cannot be urged the presumption is there was no newspaper published. The presumption is the other way. The rule of pleading is that every presumption or intendment is taken most strongly against the pleader; that had there been no paper there the complainants would have averred it.

Again. Section 2 of this act of 1869 provides that the legal voters "may make *appropriations* or *donations* to aid in the construction of said railroad." The petition, the notice, and the vote, as shown by the "clerk's certificate" in this case, was "for or against raising a *subscription by tax* upon said town of the amount of thirty thousand dollars and the right of way through said town." This language does not express an appropriation or donation, but would seem to be rather a subscription to the capital stock of the company. The language is the same prescribed by the general laws when the voters of any county or city were to vote upon the question of a subscription to the capital stock of the company. The language of the act of 1849 is that the ballots shall contain the words "for subscription" or "against subscription." (Pub. Laws, 2d session, page 33) And the voters of St. Anne might well suppose that if they voted thirty thousand dollars as a "subscription" they were to receive that amount of the capital stock of the company, and their town would be entitled to a voice in the board of directors and a share in the profits of the business. If it was intended to be as a "donation or appropriation" why was it not so expressed? The form used was a deception and a fraud unless it was intended for a subscription for stock. It seems to us that this notice is too ambiguous and uncertain to be taken as a compliance with the law. We think that "a subscription by tax" does not mean "an appropriation or donation," and this court

cannot hold that the voters intended to vote "a donation" to this railroad company.

Again. This notice also embraced with "a subscription by tax of thirty thousand dollars upon said town," "the right of way through said town." This renders it even more ambiguous and uncertain. Was the thirty thousand dollars to be paid for the right of way, or was the right of way voted by the town in addition to the thirty thousand? How was the town to vote the right of way? Did the town own the land and intend to give the right of way, or did the town vote to pay for the right of way? If the town was to pay for the right of way in addition to the thirty thousand dollars, then it would take more money, and yet it is not specified, and sec. 3 of the law of 1869 says, "In all cases the notices given shall specify particularly the amount to be voted for or against at such election; and in no case shall the appropriation exceed the amount specified in the notice or notices."

Again. The certificate of the town clerk as to the result of said election certifies that "one hundred and twelve persons voted for said tax according to said provision and seventy-five voted against said tax." (p. 5 of record.) It will be seen by the petition and the notices copied that three propositions were submitted to the voters.

First—To vote for or against raising a subscription by tax upon said town of the amount of thirty thousand dollars.

Second—The right of way through said town.

Third—That said sum of thirty thousand dollars shall be paid in bonds bearing interest not to exceed ten per cent per annum payable in installments, etc.

The certificate does not show how the persons voted upon any of these propositions. It says they voted "for said tax." It does not show that they voted "for raising a subscription by tax." It does not show that they voted for the right of way through said town." It does not show that they voted "that said sum of thirty thousand dollars should be paid in bonds." The result of the election as certified by the town

clerk does not show the vote upon any one of these propositions as they are stated in the petition and notices.

Again. The *first* and *third* propositions are inconsistent with each other. If the vote was in favor of raising a subscription *by tax upon the town* to pay thirty thousand dollars, then it could not be that the thirty thousand dollars should be *paid in bonds.*

One of the laws under which the vote is claimed to have been taken, section 4 of the law of 1869, provides that "the authorities of any township, town, or city, such township, town, or city *having voted to contribute aid* in the construction of said railroad, may borrow money to promptly meet such contributions, and issue bonds," etc., but no power is given to the voters to vote bonds. If the subscription is to be paid by a tax upon the town, then it cannot be paid in bonds. The two propositions are inconsistent, and when the clerk certifies that "one hundred and twelve *persons* voted for said tax according to said provision and seventy-five voted against said tax," upon this petition and notice how can it be said the legal voters have voted "an appropriation or donation" to this railroad company as the law provides they might do? But if they first voted an appropriation or donation, then the town authorities were authorized to borrow money and issue the bonds of the town for the borrowed money. But if it should be claimed that the vote was in favor of a tax and that the other propositions were ignored, then we say the vote was not sufficient, because by the terms of the law there must be a vote in favor of "an appropriation or donation," and then the proper authorities determine whether they will "levy and collect taxes in the manner that other taxes are levied and collected to promptly meet the obligations assumed," under section 2 of the act, or whether they will "borrow money to promptly meet such contributions and issue bonds," etc., as provided in section 4. This certificate says that they voted for a tax. This was one of the ways that the town authorities might provide for paying "the appropriation, donation or contributions," but was not a vote "to appropriate, donate or contribute," and

no such vote is shown by said certificate to have been taken or given by the legal voters of St. Anne.

Again, it cannot be claimed that the certificate shows anything more than a vote for a tax. This being so the railroad company could not claim any right to have bonds issued to them. In the first place there was no authority in the law to vote bonds to the railroad company, and in the second place the certificate does not show that bonds were voted. The litigation referred to in the complainant's bill was all in relation to certain bonds. And the supreme court of the State decided in the last case before it, in which Joseph E. Young & Co. and the Chicago, Danville & Vincennes Railroad company were complainants, and the town of St. Anne was defendant, that the railroad company had no claim for bonds. They decide that "the law authorizes the donation in money and not in bonds." 101 Ills. Rep, page 151. This case concludes the railroad company and Joseph E. Young & Co. as to any rights by reason of their failure to get the town bonds, and must of course conclude their assignees.

The bill (page 2 and 3 printed record) misquotes the law of 1869—which complainants make part of their bill. That act (sec. 4) authorizes towns to borrow money *and* issue bonds for the borrowed money, and authorizes the town to borrow the money by negotiating the bonds, and to levy tax to pay the same and interest.

The bill (page 2 and 3 printed record) says the act authorized towns to borrow money *or* issue bonds; that is to say may borrow money to pay the contribution *or* may issue bonds instead of borrowing money—may do one *or* the other. The statute uses the conjunction *and*, but the complainants in their bill change *and* into *or*, which gives an entire different construction to the act than it will bear. The issuing of bonds provided by the latter act is only a part of the method of borrowing the money and no more. That is the construction put upon the act by decision of the supreme court cited.

This proof, which is set out in the bill as the groundwork

of this whole claim, is entirely wanting in compliance with the law, and does not show any authority for creating a debt against the town as a donation against the railroad company. What may have been done afterwards as charged in the bill by way of auditing this claim or otherwise cannot bind the town.

This certificate of the town clerk is presented in the bill as the evidence or proof of this election. It does not show a legal election. And without a legal election and record proof of the facts constituting it such, the foundation entirely fails.

1st. It does not show that it was held at the place provided for in the notice, "The Institute room."

2d. It does not show an election by "legal voters."

3d. It does affirmatively show that the persons voting were "persons," and that includes both male and female, and children as well as men and women, and also aliens.

4th. There is no evidence that the minutes of the election were ever filed in the town clerk's office.

5th. There is no evidence that at the election there was any "*presiding officer.*"

6th. There is no evidence that there was any "clerk of that special town meeting."

7th. The proceedings of the election never were signed by "the clerk of said meeting" nor by "the presiding officer."

8th. There is no evidence that any minutes of a special town meeting were kept and returned to the town clerk's office and recorded as the law requires.

9th. If any election was held, and the proceedings were attested by "the clerk of said meeting, and the presiding offi-

cer," still they do not show any "appropriation or donation" by the legal voters of St. Anne township.

10th. The petition, the notices and the certificate of the election by the town clerk are all ambiguous, uncertain and contradictory, and upon their face, as set out in the bill, entirely fail to show the "authority" to subscribe for stock, or to make a donation, which is required before the town board could legally act, and without which authority any action of the town board in auditing the claim or issuing bonds would simply be illegal and void. This is firmly settled by the decisions and it is unnecessary to cite them. But if the bonds had been issued under the vote taken, which the bill informs us was done, and these bonds were issued on the contract made between the Chicago, Danville & Vincennes Railroad Company and Joseph E. Young & Co., as the bill alleges, for said Joseph E. Young & Co., then it would seem that they must have been issued under the law of 1867.

This bill fails to informs us with certainity under which act of the legislature this vote was taken and these bonds issued. It refers to both the acts of March 7, 1867, and the act of March 24, 1869. The contract with the railroad company by which Joseph E. Young & Co. were to have these bonds as claimed was made February 2, 1889, which was before the last law was passed, and it would seem from the averments in the bill that the complainants are relying upon the act of March 7, 1867. And the bonds, of which they have given us a copy in the bill, are in form such bonds. The bill alleges (on page 8 of printed record) "that in conformity with said *several* acts of the legislature" said election was held. The clerk's certificate does not show any vote upon issuing bonds, as we have already shown. So it would seem that the vote was taken under the act of 1867, which *does not provide for issuing bonds* for any purpose.

This act gave no power to issue bonds, but provided that "the authorities of said townships, town or cities respectively,

are hereby authorized and required to levy and collect a tax, and make such provisions as may be necessary and proper for the prompt payment of the appropriation under the provisions of this law."

We have called the attention of the court to the fact that the bond set out in the bill shows upon its face that it purports to be issued under the act of 1687. The supreme court decided in the case of Middleport vs. The Ætna Life Insurance Company, 82 Ills., page 563, that bonds issued under this law were void, no matter in whose hands they might be, as there was no authority by this law to issue bonds. And this bond is signed only by the supervisor. It has been held that the supervisor and town clerk are the proper authority to execute bonds of a town when authority is given towns to give bonds. It is said in section 4 of the act of 1869, the "authorities" of any township * * may issue bonds for borrowed money. There is no law which gives the supervisor alone the power to execute bonds of the town. The courts have declared that the proper "authority" to execute bonds are the *town clerk and supervisor.*

Town of Windsor vs Hallett, 97 Ill., 209.
Town of Windsor vs Niantic Savings Bank, 97 Ill., 229.
Town of Prairie vs Loyd, 97 Ill., 205.
Town of Walnut vs Wade, 103 Ill., 683.

The supervisor could not bind the town by an authorized act, and we think under the law as held by the State and federal court, that those bonds upon their face show they are invalid and also by Ætna Life Insurance Company vs Middleport, 82 Ill., 563; also held in Town of Prairie vs Loyd above cited, which is approved in the subsequent Illinois cases above cited that the burden of proving the validity of bonds issued since the constitution of 1870, as the bonds in question were, is on the holder; *that such bonds are prima facie invalid.*

Complainants proceed on the theory that the result of the alleged special town meeting created an indebtedness from the

town to the C., D. & V. R. R. Co. That construction is not warranted. It is held that a vote to donate, to give, does not create an indebtedness, only creates "authority" to donate, to give.

Aspinwall et al vs Board of Commissioners of County of Davis, 22d Howard, 364.

Board of Commissioners of Town of Concord vs Portsmouth Savings Bank, 2d Otto, 626.

We think we have shown the proper authorities, under the acts of 1867 and 1869, had no authority to donate, to give, only money, not bonds. A donation being a gratuity, the town would not be bound to the C., D. & V. R. R. Co. until an actual delivery of the money. The proper town officers under those acts could not bind the town except in the manner pointed out in those acts. The first act does not authorize the issuing of bonds for any purpose, and the second act only authorizing the issuing of bonds for the purpose of obtaining money to donate.

It is averred and claimed in the argument of complainants that the authorities, town auditors, "audited" a claim. There was no indebtedness existing to audit; the donating was yet to be done by the proper authorities in manner provided by the act of 1869 or 1867 if the act of 1869 applies. A promise to give, until consummated, could have no force until a delivery.

The complainants in this bill and argument rely greatly upon the case of Coyer et al vs C., D. & V. R. R. Co. et al, 79 Ill., 374. We are unable to see wherein that case helps them. In the first place, as will be seen by an investigation of the case, the Town of St. Anne *was not a party to the case*, neither were Joseph E. Young & Co. parties. The case was by some taxpayers vs some of the town officers and the railroad company. Again, an inspection of the case will show that no question of law was involved. By an inspection of that case it will be seen the ground relied upon by the com-

lainants in the Coyer case was the invalidity of an election upon two points. 1st. The insufficiency of the petition. (signatures having been denied). 2d. Notices not having been posted as required by law. All there was before the court was the question as to *weight of evidence* on those points. The question as to whether the railroad company was or was not by force of law entitled to the bonds, that is to say the construction of the acts of 1867 and 1869, was not involved in the case, and all the court said about the railroad company being entitled to bonds must be taken in connection with the weighing of the evidence, or otherwise what the court did say on this point is but an *obiter dictum*. Again the bill (page 8, printed record) shows that after the case was remanded to the circuit court for further proceedings, the complainants in that bill, Coyer et al, dismissed their bill, and hence the proceedings in the case, there being no final judgment, would not bind even the parties to the bill much less the town of St. Anne which was not a party. The counsel for complainant in his argument, certainly misconceives the force and effect of that case, or he would not put the great stress upon it which he does in his argument, page 28.

The case of Joseph E. Young & Co, and C. D. & V. R. R. Co. et al vs Town of St. Anne et al (101 Ill., 151) cited by complainants in their bill, (page 10 printed record) cannot be passed over so lightly as complainant's attorney would have the court do. That was a case between proper parties, and a final judgment in the supreme court affirming that of the circuit court. One of the questions involved was, as to whether under those statutes the C. D. & V. R. R. Co,, and Young & Co., were entitled to bonds, and the court held the negative; that the money could only be raised by taxation or by borrowing and giving bonds for the loan. This case was an affirmance of the doctrine announced in the Aetna Ins. Co., vs Middleport, 89 Ill., 563, above cited, that the statutes did not authorize donation of bonds.

The complainants in their argument, page 28, say they

have elected to rely on the decision of the supreme court of Illinois, in the case C. D. & V. R. R. Co., vs Coyer et al, 79 Ill., 373. So it appears by their bill they do rely. (Page 8, printed record). We have commented on that case, page——, showing that the defendant, Town of St. Anne was not a party to that case, that the question before the supreme court was in relation to weight of evidence as to posting notices and as to the signing the petitions by certain persons, and that complainant's bill shows after the case was reversed and remanded to the circuit court, the case was dismissed by complainant, Coyer, and hence no final judgment in the case to bind any one, not even the parties to the suit much less the Town of St. Anne who was not a party. In this connection the complainants also say they rely upon the decision in

Town of Windsor vs Niantic Savings Bank, 97 Ill., 229.
Town of Windsor vs Hallet, 97 Ill., 209.
Town of Prairie vs Loyd, 97 Ill., 197.
Town of Walnut vs Work, 103 Ill, 683.

It seems to us that the complainants are willing to rely upon a very unsatisfactory foundation. We have cited those cases, page——for the purpose of showing that the alleged bonds were not executed by the town authorities, that the supervisor alone was not the proper authority to execute bonds, but the *town clerk* and supervisor were the proper authorities to execute bonds. Each of those cases hold that the proper authorities are the *town clerk and supervisor.* The bonds in question were signed by the *supervisor alone.*

Those Illinois cases hold expressly, the first case in order, *Town of Prairie vs Hallet,* that the burden of proving the validity of bonds issued since the constitution of 1870 rests even in the hands of a bona fide upon the holder; *that such bonds are prima facie invalid.*

In this connection the counsel for appellant in his argument, page 29, animadverts very strongly upon the efforts

of the Town of St. Anne by its officers, counsel, etc., to protect itself from an unlawful act. Such comment was uncalled for, and the court will pardon us for remarking that that reflection of the counsel forcibly reminds us of the familiar old story of the cry of the rogue when endeavoring to direct attention from himself, "stop thief."

We are surprised at the statements made by camplainant's solicitor, and the reflections upon defendant's counsel. He says "the officers of the town acting under the advice of learned counsel employed force and fraud to accomplish their purpose." And the action of the town officers "ought to have consigned each and every one of the participants in the same to the penitentiary." And he learnedly cites the criminal code of Illinois. Does he expect this court to enforce the sentence in this case? If not, why does he cite authority? If the learned solicitor would confine himself to facts and examine the records he would find that one of his predecessors in the prosecution of this stale claim prosecuted proceedings for the purpose of effecting the object suggested and threatened by him, and that it all ended in smoke for the reason that his clients had no claim upon the bonds and no interest in them.

The complainant's counsel repeatedly charges that we misrecite the averments of the bill. In a note at the bottom of page 8 of his argument he says the "counsel for the Town of St. Anne in their statement of facts have not followed the allegations of the bill, which they are bound to do for the purpose of their demurrer. They have no right to set up a different state of facts from those alleged in the bill." And on page 15 he says "the statements made in the demurrer are frequently misrepresented by the allegations of the bill." And he says our demurrer "was hastily prepared, and not revised with that care which a pleading of this kind demanded," etc. We tell counsel for complainants that he is mistaken entirely. The trouble is with his bill and not with our de-

murrer, and we will show that he and not our demurrer *misrepresents* the allegations of the bill. But as we do not wish to be exceeded in courtesy, even though charged by the eminent counsel with having "advised force and fraud," we will not charge such misrepresentations of the bill to have been made purposely.

The first four paragraphs on pages 1 and 2 of brief are *misrepresentations* of the bill. The bill states, on page 11 of printed record as follows: "Your orators further show that John H. Stebbins, Edward G Judson, Willie Amos Tenny and Sutherland Tenny, are the *real equitable owners of all and singular* the interests, claim and demand of said Joseph E. Young & Co., or said railroad company, or its receiver, against said town of St. Anne, and in and to the bonds herein set forth." And on page 14 of printed record as follows: "Therefore your orators, John H. Stebbins, Edward G. Judson, Willie Amos Tenny and Sutherland Tenny, who are herein made parties to this cause, are now entitled to *all the interest* of said Joseph E. Young and Co. to the claim against said town of St. Anne." And in the prayer of the bill, on page 15 of printed record, they "ask that your orators, John H. Stebbins, Edward G. Judson, Willie Amos Tenny and Sutherland Tenny, may be decreed to be *the legal and equitable owners* of said claim of said Joseph E. Young & Co. against said town of St. Anne."

What foundation then is there for counsel stating that the complainants "Amos Tenny and Edward G. Judson, after satisfaction of their debts, claim any balance that may be recovered?" No such claim is made in the bill anywhere, but on the contrary the assignments and the averments of the bill are all to the effect that the old firm of Joseph E. Young & Co., and each member thereof, had parted with all their interest in these claims. This was the point made by the first special cause of demurrer. Yet in noticing which, on page 9 of argument, the solicitor of complainants says that "the bill

alleges that these assignments were merely to the extent of covering and paying certain debts.' *We state that the bill nowhere alleges any such thing.*

Again it is said in regard to our second special cause of demurrer that the bill is double "that the bill makes no such allegation as we say it does in our demurrer." (Page 9 of argument). Let us see: The bill charges, on page 14 printed record, that on November 30, 1877, Joseph E. Young & Co. recovered a judgment in the circuit court of Iroquois county against said railroad company for the sum of $588,556.10, "but your orators aver that one-third of said judgment was equitably recovered for the use and benefit of said John H. Stebbins, who had succeeded to all the equitable rights of said Joseph E. Young." Does not that sustain our statement that Stebbins, Judson and Tenny claim to have a judgment against the C. D. & V. R. R. Co? And do they not seek to have the claimed indebtedness of the town of St. Anne to the C. D. & V. R. R. Co. applied upon this judgment? And to that extent they make their bill a creditor's bill. And do they not ask, on page 15 of printed record of bill, "a decree for the amount so due (viz., the $30,000 with interest thereon) may be entered herein against said town to be paid your orators, John H. Stebbins, Edward G. Judson, Willie Amos Tenny and Sutherland Tenny, as the equitable assignees of said Joseph E. Young & Co?" Is not what we say in our demurrer then true? But on the other hand *it is not true*, as stated by counsel, that by the bill "Stebbins, Edward G. Judson, and Willie Amos and Sutherland Tenny claim only an interest to the extent of debts due them, and Wm. D. Judson and Amos Tenny claiming the balance."

Wm. D. Judson and Amos Tenny, as co-complainants, allege that "John H. Stebbins, Edward G. Judson, Willie Amos Tenny and Sutherland Tenny are the real equitable owners of all and singular the interests, claim and demand of said Joseph & Co., or said railroad company, or its receiver against said town of St. Anne." Page 11 of printed record

attempted to shade the bill all through, and give it a color and a meaning entirely different from its reading.

The statement frequently made that the case of Joseph E. Young & Co. and the C. D. & V. Railroad Company 101 Ill., Rep. page 158, "was dismissed without prejudice" is another of those misrepresentations or only half truths—a suppression of the real truth in order to mislead the court. The order of the circuit court in that case was as follows: "Demurrer to bill sustained for want of equity appearing on the face of the bill, and bill dismissed *without prejudice to any proceedings at law.*" This was the order affirmed by the appellate court, and again by the supreme court. Why is this order of the court always suppressed and the averment made that the court dismissed their bill without prejudice, and thereby giving the right to bring another bill in chancery, when the order was "without prejudice to any proceedings at law?"

II.

We now continue our argument upon the demurrer to the bill as it reads upon its face.

The bill claims an election in June, 1869, and the completion of the road through the town of St. Anne in December, 1869. At this time, if ever, the town became liable to the Chicago, Danville & Vincennes Railroad Company for the sum of $30,000. For the purpose of avoiding the statute of limitation, which doubtless run against this claim in five years, he present complainants in this bill set up that litigation has has been going on, by other parties for the bonds which it is claimed were voted, nearly ever since, and that the last case before coming into this court was commenced in the Circuit Court of Kankakee county, in September, 1877, and was finally disposed of by the Supreme Court against the complainants Joseph E. Young & Co., and the Chicago, Danville & Vincennes Railroad Company, November 10, 1881. The former litigation was all reviewed in that case, and the Supreme Court

held, that neither Joseph E. Young & Co. nor the railroad company were entitled to have the bonds of the town.

In the first suit by Coyer et al vs. the Chicago, Danville & Vincennes Railroad Company et al, reported in vol. 79, page 374 Ill. Reps., the suit was commenced against the town officers to prevent the issuing and delivering of the bonds to the Chicago, Danville & Vincennes Railroad Company, or disposing of them. A decree was obtained to cancel them and they were ordered brought into court for that purpose, and afterwards the railroad company came in upon its own petition and got the decree set aside. As these cases are referred to in the bill and made apart of it, it will be proper to copy here that petition of the railroad company, which is sworn to by their attorney, Edwin Walker. After reciting the decree of the court, which enjoined the town officers, the petition then states the claim of the railroad company as follows: "Your petitioner further represents unto your Honor that upon the construction of said road through said town of St. Anne, the proper officers of said township, her co-defendants in said bill of complaint, to wit, on or about the 15th day of December, then intending, as she believes, to carry out in good faith the wishes and obligations of said town as expressed and assumed by said township at said meeting, did proceed to have executed, and did execute, as she is informed and believes, the bonds of said town, as by law they were and still are authorized so to do, for the purpose of negotiating the same, and thereby procure the means to discharge the said indebtedness of said town to your petitioner, as they were in duty bound to do; and your petitioner avers, and so charges upon information and belief, that said bonds are now under the charge of this court and in the custody of the clerk thereof, and in fact remain uncancelled, and that said officers of said town claim and so represent, that by the action of this honorable court, and that under said final decree, they are restrained from disposing of said bonds and discharging said indebtedness of $30,000; and your petitioner avers that said indebtedness still remains wholly unpaid."

"Your petitioner therefore prays that she may be permitted to appear in this court and be heard touching the matters mentioned in said bill of complaint and said final decree, and that such proceedings may be had therein as if your petitioner had been summoned and had appeared in and to the same, and the aforesaid claim had not been made, and for such other and further equitable relief as your petitioner may be entitled to; and your petitioner will ever pray, etc.

THE CHICAGO, DANVILLE & VINCENNES RAILROAD CO.
E. WALKER, Solicitor for Petitioner.

STATE OF ILLINOIS, }
Kankakee County, } ss.

Edwin Walker being duly sworn deposes and swears that he is and has been since the first day of January, A. D 1869, the general Attorney and Solicitor of the Chicago, Danville & Vincennes Railroad Company, the foregoing petitioner, in whose behalf he makes this affidavit. He further swears that he has read the foregoing petition and knows the contents thereof, and that the same is true in substance and in fact except as to matters therein stated upon information and belief, and as to those he believes the same to be true.

EDWIN WALKER.

Subscribed and sworn to before me this 19th day of April, A. D. 1872. NOEL BROSSEAU, Clerk."

It will be seen by this sworn petition of the Railroad Company, by its general attorney, who had been such from the first of January, 1869, during the whole period when these bonds are said to have been voted and audited and issued, and when it is claimed they were delivered to Joseph E. Young & Co., and re-delivered to be registered, and all that sort of thing—this general attorney of the railroad company, Edwin Walker, swears that these bonds were executed "*for the purpose of negotiating the same*," and thereby procure the means to discharge the indebtedness of the town to the railroad company, and he complains that the decree "restrains the town

officers from disposing of said bonds and discharging said indebtedness." It is not claimed by the railroad company at this time when represented by their able solicitor under oath that these bonds were ever executed for any purpose or for any party, except to dispose of them to borrow the money on their bonds, as provided for under section 4 of the act.

The question involved in that suit was disposed of by the Supreme Court by reversing the decree of the Circuit Court, and the complainants thereupon dismissed their bill.

There was no affirmative action by the railroad company in this case to recover the alleged indebtedness of the town, but they simply came in as party defendants with certain town officers, on their own petition, to help the town officers beat the complainants in the bill, who were legal voters and taxpayers of the town. These bonds having been executed as charged for the purpose of disposing of them under section 4 to raise money, and having been placed in the hands of the clerk by the order of the court to be cancelled and destroyed. When the suit was finally dismissed in 1876, the town authorities were entitled to the possession of them, to negotiate them or otherwise dispose of them as they saw fit. To get possession of them they replevied them from the hands of the clerk of the Circuit Court, as shown by the record, which is introduced into and made part of the bill on pages 9 and 10 of record, and then destroyed them as shown on pages 9 and 10, as they considered they clearly had a right to do. *Then afterwards in September, 1877*, this railroad company joins with it Joseph E. Young & Co., and they both commence their first affirmative action against the town as shown by the bill. Record, page 10. That action was commenced to compel the town to issue other bonds and deliver the same to them. Then for the first time Joseph E. Young and Co. came into court, and they claim the bonds by reasons of a contract which they say they had with the railroad company before the vote was taken. Yes, even before the act of 1869 was passed

under which the people were authorized to vote. They say in this bill they had a contract with the railroad company that it would assign, "and it in fact did transfer, set over and assign to them all bonds, aids and contributions." Record, page 3. This contract was made February 2, 1869, and one of the laws under which it is claimed that aid was voted was not passed until March 24, 1869.

Joseph E. Young & Co. and the Chicago, Danville & Vincennes Railroad Company are the complainants, and the town of St. Anne is defendant. They chose their own forum and their own form of action, and the subject matter of their claim was these bonds. They set up, as will be seen from the decision, all this matter of the bonds having been replevied and burned by the town officers, and the Supreme Court decide that "the provisions of the law authorize a donation in money and not in bonds. But it is provided that when so authorized by vote the town authorities may borrow money to pay the donation and issue bonds of the town for its payment. It is purely a matter of discretion to be exercised by the town authorities, whether they will raise the amount by taxation or borrow it and issue bonds of the town. The railroad company only has a claim for money, and has no right to say whether it shall be raised in the one mode or the other mode. If the law has been in all things complied with in voting the donation, the town is liable for the payment in money of the sum voted, and no reason is perceived why the amount could not be recovered by an action at law. If the bonds were issued the railroad company could not be compelled to receive them instead of money, nor can it compel the town to issue its bonds." Chicago, Danville & Vincennes Railroad Company vs Town of St. Anne, 101 Ill. 154.

This decision must end all complaint of Joseph E. Young & Co. and the Chicago, Danville & Vincennes Railroad Company, on account of the town refusing to let them have the bonds. It will thus be seen that neither of these parties ever

brought suit for the money which they claim the town voted in June, 1869. The first time any suit was ever brought to recover the money voted in aid of this railroad company was the suit which is described in the bill on page 10 of record as having been commenced in the Circuit Court August 1, 1883. In that suit Joseph E. Young & Co. are complainants and the town of St. Anne is defendant. A demurrer was sustained to that bill, and on June 2d, 1884, the bill was dismissed by the court.

This is briefly the history of the litigation as set out in the bill, and appearing from the cases referred to.

The complainants in this suit who have not been complainants before, are the assignees of Joseph E. Young & Co., John H. Stebbins, who claims to have suceeded to the interest of Joseph E. Young, Edward G. Judson, who claims to be the assignee of the interest of William D. Judson, and Willie Amos Tenny and Sutherland Tenny, who claim to be the assignees of the interest of Amos Tenny. (See bill from pages 11 to 15 of record.) They make their first appearance in this controversy after the court had sustained a demurrer to the bill filed by Joseph E. Young & Co., which was dismissed June 2, 1884. After the court sustained a demurrer to that bill the complainants Joseph E. Young & Co. got leave to amend, and these pretended assignees, who had slept in the stillness of the grave during all these preceding years, were then for the first time brought forth by this notable firm of Joseph E. Young & Co., and an attempt was made to keep that case alive by the infusion of new blood. That case, however, having gone also to sleep with its fathers, a new one is commenced and Joseph E. Young, the leading member of the firm only, is left out. We do not see wherein this suit has any advantages over its predecessors. Two of the original parties, William D. Judson and Amos Tenny, are still retained as co-complainants with their assignees and the assignee of Young. These assignees claim through Joseph E. Young &

Co. and claim to have succeeded to their rights against the railroad company and against the town. If this claim is barred as to Young & Co. it is also barred as to these assignees. According to the clerk's certificate before referred to, the vote was "for said tax." If this created any liability upon the town at all it was merely authority to make an indebtedness, and the proper town authorities might levy a tax or issue bonds. We think all the cases in reference to railroad aid bonds will be found to sustain the view that the vote was merely authority. Such is the view of the court in Aspinwall et al vs. Board of Commissioners of the County of Davis, 22 Howard, 364.

Board of Commissioners of the Town of Concord vs. Portsmouth Savings Bank. 2 Otto, 626.

This authority was given, if at all, in June, 1869. Joseph E. Young & Co. did not assert any claim or institute any suit until September, 1877. These assignees claim to have obtained their rights to this tax through assignments made to them in February, 1876, and they didn't appear to make any claim until the summer of 1884. As to Joseph E. Young & Co., no claim is made until more than eight years have elapsed, and as to these assignees more than fifteen years since the vote was taken, and more than eight years after the assignments were made to them. If Joseph E. Young & Co. were entitled to these bonds or this tax that was voted as claimed by them, it was no excuse to them for not bringing suit that the railroad company were claiming the tax and had become parties in the suit of Coyer et al, in 1870, and if these assignees were entitled to this tax by bona fide assignments to them in 1876, it was no excuse to them for neglecting to sue because Joseph E. Young & Co. brought a suit in 1877. We think as the Supreme Court said in the case before referred to, that if the town was liable at all, it was for the payment in money of the sum voted, and an action at law, brought at the proper time, was the proper action if any could be sustained. But no action at law could have been maintained by the railroad company after five years, and no action could be main-

tained by Joseph E. Young & Co. who claim through the railroad company, and no action can be maintained by these assignees, who now claim through the said Joseph E. Young & Co. And complainants do not gain anything by resorting to a Court of Chancery. The rule in this regard is fully stated and very applicable to this case by the Supreme Court of the United States as follows: "The law of laches like the principles of limitation of action, was dictated by experience and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded.'

Brown vs The County of Buena Vista, 95 U. S. 161.

The same reasoning is found in Golden vs Kimmell, 99 U. S. 211.

Such reasoning invoked on behalf of a private individual will apply with greater force in behalf of a municipal corporation whose officers are ever changing and its inhabitants not having the incentive to fix in memory the details of public affairs that a private individual has in relation to his own private affairs. Here nearly sixteen years have elapsed since an alleged vote was taken upon which complainants base their claim. No minutes even of the election, signed by the clerk of the meeting and the presiding officer as required by law, are claimed to be in existence, much less to have been filed and recorded in the town clerk's office. All the evidence of such an election must be proved by parol, if proved at all. As said by the Circuit Court with so much force in deciding the demurrer in the former case: "The court would presume that a large number of the persons who voted at that election were not at present residents of the town, having either died or moved away." We think this reasoning of the court holds as strong in this case as in the other, and after this great lapse

of time the court will not require this municipal corporation to defend its tax payers against this stale claim.

We have said that the statute of limitation ran against this claim in five years. We think it could not come under the sixteen year limitation act of 1849. Second Session, Pub. Law, 1849, page 44 (bound with Pub. Law of 1851), Gros Statutes, 1869, page 430. The seventeenth section of that act provides that "All actions founded upon any promissory note, simple contract in writing, bond judgment or other evidence of indebtedness in writing, made, caused or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter." As it has been held the vote of the town could not be anything more than authority for the proper authorities to make an indebtedness in such a way as the vote authorized and the law permitted. It was not a "promissory note," it was not a "simple contract in writing," it was not a "bond," it was not a "judgment or other evidence of indebtedness in writing," either under the vote or the law of 1867 or 1869, by virtue of which the vote was taken. If it was a promise at all, it would come under the five year limitation of the act of 1849, sec. 2 —if that statute was applicable to the case and if the complainants were entitled to the money as equitable assignees or to the bonds at the time as alleged, then under the act of 1849 they were barred in five years. But the limitation law of 1872, Pub. Law, 1872, page 559, sec. 15, 2 Gros Statutes, page 258, sec. 73, has a provision which would apply to causes in equity which the law of 1849 did not have. It is provided in the limitation law of 1872, section 15, "*All civil actions* not otherwise provided for shall be commenced wi hin five years next after the cause of action accrued." A bill in chancery is a "*civil action*." Joseph E. Young & Co. did not commence their first action in the state court until September 7th, 1877. These complainants obtained the assignments in February and March, 1876, and their first action was in 1884. The statute had thus run against both these parties.

Again. The bill now filed claims the money that would be due upon the bonds, because the bonds were not issued and the time of their maturity had passed. According to this claim their action accrued for the money as soon as the last bond would have been due had bonds been issued. By looking at the averments in the bill as to the time it will be seen that the last bonds would have been due July 1, 1878. So that the five years would have elapsed July 1, 1883. As there were no bonds, no written evidence of a debt, the railroad company would have been obliged to bring their action in five years from the time of the maturity of the last bond, and these other parties must be equally bound. If these complainants rely upon the former suits about these bonds to relieve them from the statute of limitation, then they must take them for all there is in them. If these suits have been prosecuted for their benefit, then they are bound by the decisions of the State Courts, and the last decision holds that no party is entitled to bonds, but must go for money if anything, and when they go for money, the statute of limitation of the State comes in as an effectual bar to their recovery.

We think in a suit at law to recover from the town the money claimed to have been donated by a vote of the people, the statute of limitation would bar the claim in five years. When Joseph E. Young & Co. first made a claim in September, 1877, a suit at law would have been barred. When the assignment was made to these assignees in 1876, the claim was already barred at law by the statute of limitation, and equity will often treat a claim as barred in less time than fixed by statute.

Golden vs Kimmel, 99 U. S. 201.

Brown vs The County of Buena Vista, 95 U. S. 160.

Castner vs Walrod, 83 Ills. 171.

Sloan vs Graham, 85 Ills. 26.

III.

An averment is made in this bill which never appeared in any of these proceedings until lately, namely "that on, to-wit. December 27, 1870, Leon Maileaux, supervisor of the town of St. Anne, acting under direction of the town authorities, took said bonds to the city of Chicago, and delivered the same to Joseph E. Young & Co., as the contractors and builders of said railroad and entitled to the possession and ownership of said bonds under their contract with the said railroad company," and that after the delivery of said bonds to said Joseph E. Young & Co., they sent Maileaux with the bonds to Springfield to have them registered, and that he stopped on his way at St. Anne, and then it was he was served with process in the suit of Coyer et al vs The Town Officers, and then he was enjoined from again delivering them. (Page 7 of record) It seems very strange indeed if this averment were true, that it should not have appeared before the filing of the amendment to the bill dismissed by the court, June 2, 1884, and now brought into this bill. In all the controversy about these bonds by the railroad company and by Joseph E. Young & Co., this statement or pretence never was before brought forward. For the purpose of this demurrer it would be taken as true, if it were not contradicted by all the other alleged facts in the bill. But we will upon that assumption examine the effect of it upon defendant's liability in this suit.

In the first place if there was no legal election, as we have contended under the first head of our argument, then it would make no difference if bonds were executed and sold or delivered to third parties; they would be void in whosesoever hands they might be placed. But if these bonds were executed and delivered to Joseph E. Young & Co. as alleged, December 27, 1870, and they were "entitled to the possession and ownership of the same," and they sent them by Leon Maileaux to Springfield to be registered and he never returned them, it is certainly the grossest laches on their part that

they did not take steps to secure the bonds by replevin or otherwise. It appears by their own showing in the bill that these bonds were in existence up to the 8th day of April, 1876. (See page 8 of record.) For nearly six years they permitted these bonds to remain in the hands of Maileaux and in the hands of the clerk, and never made known in any way that they had a claim upon them. When they filed their bill in the Circuit Court of Kankakee county, in September, 1877, they made no claim of such bonds ever having been delivered. What they did claim is thus stated by the Supreme Court. "Young & Co. claim that by virtue of the contract with the railroad company, they as assignees, are entitled to have bonds for that amount issued by the town and delivered to them, and hence have brought this bill to compel their issue." 101 Ills., page 153. This was the ground of their claim then, not that the bonds had once been delivered to them, as now charged, and for the first time after the lapse of nearly fourteen years. Indeed Young & Co. have never made such a claim and never avered such an improbable state of facts. It is made now in behalf and on the part of these assignees of Young & Co., and never was made except in their amendment to the bill dismissed June 2, and this bill now filed by them. We cannot believe that even on demurrer the statement of such an improbable circumstance, so much at variance with all the other facts in the bill, can have much weight. But, if true, the remedy of Joseph E. Young & Co., or these assignees, would have been either to replevin the bonds or bring an action at law for the amount of them, if destroyed. They get no standing in a Court of Chancery by that averment. It would seem, as if in drafting the bill, the pleader thought there might be some advantage in charging that Maileaux was employed "as supervisor" to take these bonds to Springfield, and that "said trust and service said supervisor then and there agreed and undertook to perform." If Young & Co. employed Leon Maileaux to do that business for them it could not be as supervisor, for acting as the agent of railroad contractors is not a duty devolving upon the supervisor of a town—the service

to be rendered must have been entirely in his individual capacity.

The bill alleges (page 5 of record) that the vote was had June, 1869; that the road was completed December 1, 1869, and that the donations then became due and payable, and bonds subject to delivery by the town to the railroad company or to Joseph E. Young & Co. We think we have shown that the statute of 1867 did not authorize the issue of bonds for any purpose; that the statute of 1869 did not authorize the issue of bonds only as the means of borrowing money; that the vote was only authority to donate, to give aid in money.

In the same connection the bill alleges that the town authorities audited the claim of the railroad company, and directed the supervisor to issue bonds to the company. The vote being only authority, in the town authority to donate, to give, there could be no claim to audit. The railroad company had no claim against the town which the auditors could be called upon to adjust. The donation could have no force or effect until executed, delivered in money.

The complainants in their bill in that same connection, recognize it as a fact that the supervisor was not the authority to donate, and seek to avoid the difficulty by alleging that the town authorities authorized the supervisor to make the donation in the form of bonds. As before stated the town authorities had no power to donate in bonds, and if they could, they could not delegate that authority to the supervisor. Public officers being themselves delegates the maxim applies to them that "one delegate or deputy cannot appoint another." "This is an official trust which cannot be delegated," the Supreme Court say in another case.

Jackson County vs Brush, 77 Ill., 58.

At the time these bonds were burned April 8, 1876, Joseph E. Young & Co. had parted with all the interest they

ever had, if any, against the town of St. Anne by assignments as shown by the bill. These assignments bear date February 8, 1876, and March 9, 1876, and the assignment of Joseph E. Young to Luther H. Pierce, who afterwards sold to John H. Stebbins, was dated January 16, 1875, and Stebbins bought November 1, 1876, and yet notwithstanding these assignments we find a bill in chancery started by the firm of Joseph E. Young & Co., to compel the town to issue bonds to them on the 7th of September, 1877. (Page 10 of record.) We find a judgment rendered against the Chicago, Danville & Vincennes Railroad Company in favor of Joseph E. Young & Co., on the 30th of November, 1877. (See page 14 of record.) This is the judgment with execution returned unsatisfied December 21, 1877, for a failure to set up which, in the bill *filed three months before*, the complainants say was the cause of their failure to maintain that bill as a creditor's bill. It is generally supposed that in order to main a creditor's bill the judgment and execution should be before the filing of the bill, and not three months afterwards.

It is claimed the bonds were executed on the 24th day of December, 1870. This was after the prohibitory clause in the constitution of 1870 went into effect. It is claimed there was a vote in 1869, but no attempt to issue the bonds until after the adoption of the constitution. It is held under the decisions of the Supreme Court "that the holders of bonds issued thereunder, after that instrument went into effect, cannot recover unless they prove the election to have been held in conformity to all of the substantial requirements of the law under which it was held." But these bonds are not issued, and now it is sought to recover upon them as if they had been and upon the interest coupons, and to treat them as if they had been issued and delivered, and had now matured. It consequently devolves upon these complainants to show not only a legal election, but legal bonds, or else to show a binding obligation by virtue of the election which at this late day the court would enforce.

Jackson County vs Brush, 77 Ills. 59.

The People ex rel vs Jackson County, 92 Ill. 441.
Town of Prairie et al vs Lloyd et al, 97 Ills. 191.

And the Supreme Court having decided that neither the railroad company nor Joseph E. Young & Co. were entitled to have the bonds. a resort now at this late day to such an incredible statement that bonds were once executed and delivered to them, it seems to us does not make their case any stronger. For, of course, if they were not entitled to compel the issue and delivery of bonds, they would not be entitled to recover, as if they had been delivered, simply because the time of their maturity had elapsed. It appears clears to us that this story now evidently trumped up must be entirely disregarded. But if for the purpose of this demurrer it is held to be true, still it gives the complainants no more standing in a court of chancery. And further we submit that after the adoption of the constitution of 1870 the town cannot be compelled to issue bonds or levy a tax under the laws of 1867, or 1869. If this is a donation and the town officers do not in their descretion see fit to consummate it now, the constitutional inhibition may be invoked to protect the tax payers against such improvidence.

IV.

We will now refer to some of the special causes assigned for this demurrer. And,

First: We make the point that there is a misjoinder of parties plaintiff, and they have no community of interest. The complainants William D. Judson and Amos Tenny, who were partners with Joseph E. Young in the firm of Joseph E. Young & Co., are shown in said bill to have assigned all their interest in the claim of said Joseph E. Young & Co. against the town of St. Anne, and so having assigned their interest, they are not proper parties with said assignees. In equity the rule is to make those parties only who have the equitable interest, and it is a misjoinder to connect with them those who no longer have any interest. It is avered in said bill on page

11, of record, "that said John H. Stebbins, Edward G. Judson, Willie Amos Tenny and Sutherland Tenny are the real equitable owners of all and singular the interests, claim and demand of said Joseph E. Young & Co., or said railroad company, or its receiver against said, the town of St. Anne, and in and to the bonds herein set forth." And then the several assignments are set out, and on page 14 of the record of the bill it is said "Therefore your orators John H. Stebbins, Edward G. Judson, Willie Amos Tenny and Sutherland Tonny, who are herein made parties to this cause, are now entitled to all the interest of said Joseph E. Young and Company to the claims against said town of St. Anne." The allegations of this bill cited, with others there made, show a plain case which makes it improper to join the assignors with the assignees as plaintiffs to this bill. Mr. Story says, "If a bill should contain allegations which show that persons who otherwise would ordinarily be proper parties have no interest in the controversy and have no title to, and make no claim to any interest," then they should not be made parties.

(Story's Eq. Pleadings, sec. 214 a.)

Secondly: The bill is double and is therefore demurrable for such duplicity. John H. Stebbins, William D. Judson and Amos Tenny claim to have a judgment against the Chicago, Danville and Vincennes Railroad Company, (page 14 of record) and seek to have the alleged indebtedness of the town of St. Anne to said railroad company applied upon said judgment, and by the same bill it is alleged that John H. Stebbins is the owner of J. E. Young's interest, Edward G. Judson is owner of William D. Judson's interest, and Willie Amos Tenny and Su herland Tenny are owners of Amos Tenny's interest, and they pray to have the said indebtedness paid to them. It will not do to say that this is the same—that if paid on the judgment the assignees have the benefit of it, because these assignments do not assign any claim or judgment against the railroad company to Edward G. Judson, nor to Willie Amos and Sutherland Tenny. By examining these assignments it will be seen, that they assign certain interests or claims against

the towns of St. Anne, Sumner and Beaver, and by examining the sale made by the receiver of Joseph E. Young to John H. Stebbins, it will be seen that he acquires thereby the interest of Joseph E. Young in certain claims against the Chicago, Danville & Vincennes Railroad Company—but there is no sale to him of the interest of Joseph E. Young against these towns. In other words, Stebbins the purchaser of Young's interest, with William D. Judson and Amos Tenny own the judgment against the railroad company. While Edward G. Judson, as assignee of William D. Judson and Willie Amos Tenny and Sutherland Tenny as assignees of Amos Tenny and Joseph E. Young or Luther H. Pierce, his assignee in bankruptcy, (page 12 of record,) owns the claims against the towns of St. Anne, Sumner and Beaver. If it is applied upon the judgment, then one set of complainants have the benefit of it. If it is given to the assignees, then another set of the complainants have the benefit. The bill is therfore double and these complainants, instead of having a common interest are opposed to each other in interest.

It is alleged in the bill that said Joseph E. Young & Co. obtained a judgment against the railroad company for the amount of their claims for building the railroad. That being the case, all equitable claims growing out of the contract alleged to have been made, would be merged in the judgment at law and would in effect be a renunciation of all claims to donations that might be made. Having recovered a judgment they could not set up a claim upon an executory contract for outside donations and aids which were to have been received in liquidation of the claim upon which the judgment is based. They cannot claim in the same bill that they are entitled to these bonds by reason of their contract with the company, and also claim in the nature of a creditor's bill to have them applied upon their judgment, as the two claims are inconsissent and different parties are interested, some in one application and some in the other.

The bill alleges (page 3 of record) that Joseph E. Young

& Co. agreed to build the Chicago, Danville & Vincennes Railroad and in consideration of so building the road the railroad company agreed on its part to assign and did assign to Joseph E. Young & Co, as their own property, all donations, bonds or aids which had been or which might be contributed by municipalities, etc., and the Chicago, Danville, & Vincennes Railroad Company agreed to execute all proper and needful assignments to fully carry out said contract between J. E. Young & Co. and the railroad company for building the road. This contract, as shown by the bill, was February, 1869. The alleged vote for donation was in June following, as shown by the bill. In the very nature of things there could not have been a sale of a thing that did not have an existence. The most that could be said in reference to it is that it was an executory contract to sell, something further to be done by the railroad company when the thing came into existence.

In fact, the whole contract, so far as payment for the work was concerned, was executory on the part of the Chicago, Danville & Vincennes Railroad Company, as shown by the contract set out in the bill, "that such bonds, aids or contribution should be paid over to it and said railroad company agreed to execute all proper and needful assignments to fully carry out said contract for building the railroad." That agreement is a link in the claim of complainants to the alleged donation. J. E. Young & Co. were to be paid for their work by the Chicago, Danville & Vincennes Railroad Company executing the executory contract on their part.

But Joseph E. Young & Co. repudiated that executory contract by bringing a suit against the Chicago, Danville & Vincennes Railroad Company at law in the Iroquois Circuit Court and recovery of judgment against that company for building the road, (Judgment referred to page 14 of record.) All claim Joseph E. Young & Co. had against the Chicago, Danville & Vincennes Railroad Company were merged in that judgment. Joseph E. Young & Co. did not assert their right to have that executory contract carried into effect, but for some reason preferred a personal judgment for the building of

the road, against the Chicago, Danville & Vincennes Railroad Company, thus abandoning whatever right they had against the railroad company by virtue of the executory part of the contract.

Thirdly: There is a strange mingling of contradictory and inconsistent averments in this bill, that makes us query whether or not there was in the mind of the framer any distinct idea of the object sought to be accomplished. First one set of complainants seek for one kind of relief, then another set of complainants seek for another kind of relief. First they want the bonds of the town, then they want the amount that would have been due on the bonds in case they had been issued, then again they say the bonds were issued and delivered and afterwards burned up. First we are told that Joseph E. Young & Co. claim by virtue of a contract with the railroad company, then we are told that they assigned all their interest to certain parties, and those parties ought to recover by virtue of that contract and the assignment to them. Next we are told Joseph E. Young & Co. got a judgment against the railroad company, and that the town owes the railroad company, and they ask to have the debt of the town to the railroad company applied on this judgment. Then we are told that the judgment does not really belong to Joseph E. Young & Co., but that John H. Stebbins owns Young's interest, so that the judgment belongs to Stebbins, William D. Judson and Amos Tenny. Next we are told that all claims against the town of St. Anne belong to Stebbins, Edward G. Judson and Willie Amos Tenny and Sutherland Tenny, and that the town does not owe the railroad company, but owes these assignees and they want the money paid to them. These are but a few of the inconsistencies and incongruities that strike the mind in reading the bill.

Again, when we look at the dates of these several transactions out of which these inconsistent claims arise we find even greater inconsistencies. The assignments were made in February and March, 1876. The judgment was obtained in

November, 1877, against the railroad company. The suit in the State court against the town was begun September 8, 1877, nearly three months before the judgment, and a year and a half after Young & Co. had sold all their interest in the subject of the suit. The interest in the judgment is owned by one set of parties and the interest in the contract by another set.

It is recited in the bill, it is true, that John H. Stebbins succeeded to all the rights of Joseph E. Young, in the firm of Joseph E. Young & Co., in and to the claims against said railroad company and against said town. But the proceedings against Joseph E. Young and the assignment to Luther H. Pierce as receiver, and the sale by him to the said John H. Stebbins do not refer to any claim in any way against the town of St. Anne, but purport to be a sale of Joseph E. Young's interest in claims against the railroad company, one for $600,000 and the other for $300,000, and there are no facts given to show that said John H. Stebbins has in any way succeeded to the rights of Joseph E. Young against the town of St. Anne. And,

Lastly: The doctrine of subrogation is invoked to help sustain this anomalous bill in chancery. What does the pleader mean when he asks that "Stebbins may be subrogated to the rights of Joseph E. Young to all his claims and demands against the railroad company." According to the averments in the bill, Stebbins obtained all these rights by the sale under the court proceedings in which Luther H. Pierce was receiver, and he obtained them by purchase. He does not need the help of a court of chancery to give him what he has already obtained. He is already, if the averments in the bill are true, the legal and equitable owner of all that interest. Then he wants "Stebbins, Edward Judson and Amos and Sutherland Tenny to be subrogated to all the rights, claims and demands of said railroad company, and said Joseph E. Young & Co. against the town of St. Anne." It is alleged in the bill that they have already obtained all these rights, claims

and demands by virtue of the assignments executed to them in February and March, 1876. If the averments in the bill are true then they already have all the legal and equitable interest of Joseph E. Young & Co. and do not need to invoke the aid of the court. We cannot see the ground of this prayer for subrogation. The subrogation that is effected by aid of the court of chancery is a very different thing from a voluntary assignment, or a sale under a decree of court by a receiver, for in these cases the legal title is transferred by the act of assignment or sale, and vests in the purchaser or assignees without the aid of the court.

V.

Section 14 of chapter 98 of the Illinois statutes provides that suits at law may be brought upon lost notes and bonds, and gives courts the right to require that the maker shall be indemnified and protected.

VI.

The authorities cited by appellant upon the question of their remedy in equity, on account of the destruction of these bonds, are upon lost bonds and not destroyed bonds. The appellants charge that all the bonds but one were destroyed by fire, and the one undestroyed would appear to be in their possession. The English courts have drawn a distinction between lost bonds and bonds destroyed. Equity never entertained jurisdiction over a destroyed bond, "because the remedy at law was always adequate." Pomroy, Equity Jurisprudence, vol. 2, page 261; Wright vs Lord Maitland, 1 K and G, 701, 708, per page Wood V C. The principal reason urged in favor of equity jurisdiction over lost bonds was that chancery could protect the maker; would require that he should be indemnified against repayment of the bond when found should it be presented for payment by a lawful holder. When the bond is actually destroyed, as in this case, it could not be presented

for payment, and consequently no indemnity would be necessary, and no reason why equity should take jurisdiction.

VII.

The appellants, through Young & Co. and the C, D. & V. R. R. Co., were denied any relief in equity because the court held they had an adequate remedy at law. They now to overcome the effect of that litigation and adjudication of the question of remedy assert that Edward Judson, Willie and Sutherland Tenny and Stebbins had equitable rights in the controversy, and that as they were not parties to the suit adjudicated they are not barred from coming into this court and asking for relief. Can it be that equity will regard with favor the conduct of these parties in standing by and allowing a controversy to be litigated in which they claim such important interests without appearing in the litigation, without asserting their pretended rights, without presenting essential facts, important if true, to obtain relief? We apprehend not. This conduct is in bad faith to courts of justice and they will be held to have acquiesced in the action taken by Young & Co. and the C., D. & V. R. R. Co., even if they were not actively engaged in prosecuting the suit. They do not give any reason why they did not prosecute the suits or become parties to it, and they make no excuse for the peculiar attitude they maintain to that litigation and do not deny knowledge of its existence. (Pomeroy, Eq. Jur. vol. 2, p 818.) But among these appellants is Amos Tenny, a member of the firm of Young & Co, who knew the facts in relation to his assignment to Willie and Sutherland Tenny if it had ever been made, and after trifling with the state court now seeks under the pretext of his assignment to experiment with the federal court in the same matter and unites in asking this relief. His conduct is certainly in very bad faith.

VIII.

Appellants claim that the fact that the bonds being deliv-

ered to Young, re-delivered to Mailloux to take to Springfield for registration, added to the other facts of their destruction, makes a material change in the facts of the bill, to take it out of the ruling of the state court, that the remedy was at law. We think that these facts should have been presented in the former suit. That it must be held that these appellants are bound by the conclusions of that suit, and that it was a duty they owed to the court that heard the case to present this among all other facts in the case, and in not doing so they waived it. There can be no question that the law required them to produce every fact material to their rights in the controversy. Courts cannot try causes by piece meal. Every fact must be presented necessary to obtain relief, and if parties elect to waive this rule they do it at their peril.

Stockton vs Ford, 18 Howard, 418.

Same case, 1 Black, f 360.

Rogers vs Higgins, 57 Ill., 247.

IX.

In conclusion we make a few general remarks. The time was when it was said by the courts that aid given to the construction of railroads was legitimate and such donations were sustained upon the ground that it was for the public benefit, but it was found that weak and sparsely populated towns, as well as large cities and counties, had been so improvident in their subscriptions and donations that they were in some instances bankrupt. The convention that framed the constitution of 1870 put a prohibitory article into that constitution, which was adopted by the people, by which it was enacted that "no county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation or make donation to or loan its credit in aid of such corporation. *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption."

This vote of the town of St. Anne was in 1869. When the attempt, however, was made to get the bonds of the town the constitutional prohibition had become a part of the fundamental law of the State, and the people of the township were unwilling that the town should incur this debt. The "subscription by tax" implied that the town was to have stock in the railroad, but no stock was ever offered the town; but if the vote was a valid one it would seem that the town was entitled to it. No stock was ever offered. The people claimed the election was illegal and void, and have ever since refused to let the railroad company have the bonds of the town or levy a tax to pay the subscription. Nearly sixteen years have elapsed, the people have contended successfully against the railroad company and Joseph E. Young & Co. in the State courts, but after all these long years a new device is resorted to. The Chicago, Danville & Vincennes Railroad Company is dead. Joseph E. Young & Co. have passed through bankruptcy and no longer exist in law as a firm or co-partnership, but certain pretended assignees, said to be non-residents of this State, and residents of the States of Massachusetts and New York, are brought in after nearly sixteen years as co-complainants in order to get a standing in the federal courts.

And again, this little town of St. Anne is called upon to defend herself against this unjust, illegal and void claim, as the people believe it to be. What was once a claim of $30,000 is now a demand for $90,000 from a little township that by the last census had a population of only 1570 souls. Which is a demand of about $51 per head for every man, woman and child in the township.

As was forcibly said by the Circuit Court in passing upon the demurrer in the former case, "the persons who voted to charge the town with the $30,000 would not be the men who would be compelled to pay it. Large numbers of the persons who voted at that election in 1869 were not at present residents of that township, having either died or moved away," and now a demand is made upon those now living there for

an amount that they would be utterly and absolutely unable to pay, and this entirely as a gratuity to a railroad corporation or those claiming through it without any pretence of any consideration whatever. Such a claim is startling. If they are compelled to raise "a subscription by tax upon the town" as charged in the bill, it would be such a tax as would, we venture to say, be unprecedented in the history of taxation—over fifty dollars for every man, woman and child in the township, and nearly five dollars an acre for every acre of land in the township. It seems to us that this bill ought not to be and cannot be maintained.

We respectfully submit our reasons and ask their favorable consideration by this court, and that the decree of the court below be affirmed.

L. E. PAYSON,
Solicitor for the Town of St. Anne.